No. 85-1797

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARLENE MACK, SHIRLEY STUKES, PATRICIA RAMSURE, QUEEN ESTHER TAYLOR, THELMA BARNES, and MAXINE MCNEILL, Individually and on behalf of all other persons similarly situated, and TRINA LEWIS, Intervenor,

Petitioners,

—vs.—

DONALD RUMSFELD, Individually and in his official capacity as Secretary of Defense, MARTIN R. HOFFMAN, Individually and in his official capacity as Secretary of the United States Army, THOMAS C. REED, Individually and in his official capacity as Secretary of the United States Air Force,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Do military regulations which categorically exclude single parents from enlistment violate petitioners' fundamental right to have and raise a family?

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OPINIONS BELOW

The decision of the United States District Court of New York is reported at 609 F.Supp. 1561 (W.D.N.Y. 1985), and is set forth in petitioners' Appendix 1 at A2, infra. The per curiam Opinion of the United States Court of Appeals for the Second Circuit is unreported and is set forth in Appendix 2, at A56, infra. An Order amending the per curiam Opinion is unreported and is set forth in Appendix 3 at A60, infra.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit is dated January 29, 1986. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISION

Constitution of the United States, Amendment V: "No person shall...be deprived of life, liberty, or property, without due process of law..."

CHALLENGED REGULATIONS

The texts of the challenged regulations are set out in the appendices to the decision of the District Court (Appendix 1, infra) as follows:

Army Regulation AR 601-210, effective April 1, 1975, and continued July 28, 1976, same as Army Reserve Regulation AR 140-111, effective May 1, 1975, at A45, infra.

Army Regulation AR 601-210, effective November 1, 1980, as amended December 1, 1980, at A46, infra.

Army Reserve Regulation AF 140-111, effective February 1, 1979, at A47, in-

fra.

Army and Army Reserves combined Regulation AR 601-210, effective October 1, 1982, at A49, infra.

Air Force and Air Force Reserves AFR 33-3, effective March 31, 1975, at A52, infra.

Air Force and Air Force Reserves AFR 33-3, effective October 14, 1977, at A53, infra.

Air Force and Air Force Reserves ATCR 33-2, effective August 31, 1982, at A55, infra.

STATEMENT OF THE CASE

This case involves petitioners' fundamental right, protected by the Due Process Clause, to have and raise a family. The issue presented is whether the Army, Air Force, the Army Reserve and the Air Force Reserve can categorically exclude from enlistment all single parents with legal custody of minor children.

FACTUAL BACKGROUND

The military's ban on the enlistment of single parents has devastating social consequences for a large and disadvantaged segment of the United States population. The people excluded are overwhelmingly female - the ratio of female single parents to male single parents under the age of 25 is 14 to 1. They are also impoverished - single

mothers are the poorest of all population groups in the country, and their numbers are growing rapidly. The National Advisory Council on Economic Opportunity found in 1980 that "All other things being equal, if the proportion of the poor who are in female-headed families were to increase at the same rate as it did from 1967 to 1977, the poverty population would be composed solely of women and their children by about the year 2000."[1]

Black women, who are three times more likely than white women to join the military, are especially affected by respondents' regulations. Young black women are 31 times more likely to be sin-

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1. "Critical Choices for the Eighties," Twelfth Report of the National Advisory Council on Economic Opportunity, Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, Stock No. 041-008-00018-1.

gle parents than their male counterparts. They comprise 35% of all single mothers; more than half the children born to black women of all ages are born to single mothers. Black women have the highest rate of unemployment of any adult group in the country and face the highest rate of poverty: more than 70% of all black families in poverty are headed by women.

The opportunities which military service would provide to single parents are unparallelled. Together, the armed forces comprise the largest employer in the country and the largest provider of training. For petitioners, military service presents an opportunity to receive training, to make a reasonable salary that is not reduced by sex discrimination, and to avoid the vicissitudes of unemployment, which was 11.1% for

single mothers in 1978, as compared to 6.0% for the general population. Also, those employed by the active services become veterans upon discharge and are entitled to a panoply of special rights, including veterans' preferences for civil service jobs and hence the opportunity for a civilian career, see, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), as well as extensive education, health, disability, and pension benefits. Finally, enlistment in the armed forces provides a unique opportunity to make a career of serving one's country.

If single parents choose to pursue this opportunity by complying with respondents' regulations, they pay a heavy price: they must give up custody of their children or terminate all parental rights outright. To enter the Air Force

or Air Force Reserve, single parents must relinquish custody permanently; for the Army or Army Reserve they must relinquish custody for the duration of their first term of enlistment, which is usually three years. Because of the legal requirement that custody decisions must be made in the child's best interest, a parent who relinquishes custody for three years may never be able to regain it. Thus respondents' regulations require the actual severance of family ties, often on a permanent basis.

A leading expert on family law, Professor Carol S. Bruch of the University of California at Davis School of Law, discusses the implications of a three year relinquishment:[2]

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2. Bruch, "Implications of Army and Air Force regulations excluding single parents with custody from enlistment (Mack v. Rumsfeld)", March 8, 1983, at 10-11,

> With its increased emphasis on continuity of primary nurturing relationships and surroundings, custody law now insures that children will not be bounced back and forth to suit the convenience of adults. The legal test that awards custody according to the best interest of the child stands as a warning to parents who would place their children for extended care with another, whether a parent, relative or stranger. A consistent pattern of judicial decisions demonstrates its effect. If a person in whose home the child has resided (i.e., a single parent who has relinquished custody in order to enlist) seeks to regain custody after a lengthy period, return of the child cannot be anticipated. A period of three or more years is considered extremely long for children of any age; it would be quite rare for children (other than, perhaps, teenagers) to be returned to a parent after such a lengthy absence unless the children wished the return. And, it would be highly unusual for children who had developed a stable, loving relationship in a new household to wish to return to a parent who had been but a visitor in the interim.

Cases across the country bear out this

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2. (cont.) reproduced, at Joint Appendix 0391-0405, filed with the U.S. Court of Appeals for the Second Circuit.

analysis.[3] Even transfer to a close relative does not assure return. Class member Geraldine Schmidt transferred custody of her two-year old daughter to her parents when she was seventeen, in order to enlist in the Air Force. Midway through the enlistment process, when she discovered that the Air Force would not permit her to regain custody, she decided not to enlist. Her parents, how-

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3. E.g., Noel v. Derrick, 71 A.D.2d 704, 418 N.Y.S. 2d 481 (1979) (father could not regain custody because children had been living with mother less than two years); In re Marriage of Carney, 24 Cal. 3d 725, 598 P.2d 36 (1979) (mother could not regain custody of children after five years even though father had become a quadriplegic); Painter v. Bannister, 258 Ia. 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966) (custody awarded to grandparents even though father had intended them to care for child temporarily and had sought return after sixteen months); see also §409 of the Uniform Marriage and Divorce Act requiring that a modification petition filed within two years of entry of a custody decree be denied without a hearing unless the child's physical or mental health is seriously endangered.

ever, refused to give her daughter back. Because Ms. Schmidt does not have the money to fight a custody battle in court, her daughter - now eight years old - continues to live with her parents. Although her daughter stays with her periodically, Ms. Schmidt's parents always come to take her back, carrying their custody papers and accompanied by police officers.[4]

Respondents attempt to justify their regulations by arguing that single parents cannot be relied upon to deploy when needed. However, this perception is factually unsupported. It is not borne out by the facts as to the petitioners - who are able to care for their children and meet their responsibilities

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4. Affidavit of Geraldine Schmidt, reproduced at Joint Appendix 1985-1987, filed with the U.S. Court of Appeals for the Second Circuit.

as full time workers - nor by respondents' own studies of single parent performance. The District Court found that "better, more reliable techniques for assessing the day-to-day performance and the likely availability of single parents in time of national crisis should be implemented..." Mack v. Rumsfeld, 609 F. Supp. at 1568. In the only independent study done on the subject, the U.S. General Accounting Office concluded that the Army has no basis for excluding single parents from enlistment.[5]

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5. U.S. General Accounting Office, "Army Needs Better Data to Develop Policies for Sole and Inservice Parents", 1982. The GAO reviewed the Army's studies of the performance of single parents and did an additional study of its own. The GAO concluded, "The Army lacks a solid basis for restricting the enlistment of sole and inservice parents...Our review showed that while some problems do exist, most sole and inservice parents included in our survey attend and perform work at least satisfactorily and would most likely deploy in a timely manner in the event

Indeed, the District Court noted that petitioner Thelma Barnes is "the most dramatic single illustration," 609 F.Supp. at 1569, of the lack of justification for respondents' categorical exclusion of single parents. Barnes' enlistment in the Army Reserve was voided because she was a single mother even though her mother, with whom she and her child lived, provided full-time child care. However, Ms. Barnes' sister, who enlisted in the Reserve on the same day as Ms. Barnes and who also had a child cared for full-time by their mother, was able to remain in the Reserve because she was married. Ms. Barnes' sister, who subsequently separated from her husband, has been promoted to sergeant.

The enlistment ban on single parents

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5. (cont.) of war or a national emergency" (at 11). Reproduced at Joint Appendix 1891-1934, filed with the U.S. Court of Appeals for the Second Circuit.

is not based on concerns about deployability; rather, it is merely the most recent incarnation in a series of enlistment regulations which have imposed various "moral" criteria on women seeking to enter the armed forces. Until recently, the services had an outright ban on the enlistment of unwed mothers, regardless of whether their children had been given up for adoption or had died. This exclusion was justified on the grounds of morality and the image of the services, and not on the basis that unwed mothers would be unable to perform military duties. No such ban was applied to the enlistment of men who had fathered illegitimate children.[6]

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6. Memorandum for the Record: Enlistment Policies for Unwed Mothers, 11 September 1970, with attached documents, reproduced at Joint Appendix 0593-0617, filed with the United States Court of Appeals for the Second Circuit.

In addition, Army enlistment regulations detailed "Special Processing for Women." The purpose of the special processing (which included a statement of marital status and the number and ages of dependents under 18 years of age) was, inter alia, to

> insure that only mature, motivated, emotionally stable, adaptable, self-disciplined and fully qualified women who possess the moral and behavioral attributes necessary for military life are accepted for enlistment in the regular Army. (emph. added).[7]

Those regulations - like the current exclusion of single parents from enlistment which falls almost exclusively on single mothers - were motivated not by military necessity but by a stereotyped view of

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7. Army Regulation 601-210, Section VII, Special Processing for Women, reproduced at Joint Appendix 0782, filed with the United States Court of Appeals for the Second Circuit.

how families should be structured. As Major General Jeanne Holm (USAF Ret.) has written, for the military "a woman's obligations as wife and mother superseded all other responsibilities and were assumed to be inherently incompatible with military service."[8]

PROCEDURAL BACKGROUND

The petitioners are seven single mothers, six of whom are black, who were denied enlistment in the Army, Army Re-Serve, Air Force, and Air Force Reserve solely because they are single parents with custody of minor children. Petitioners brought this action in 1976 in the United States District Court for the Western District of New York, alleging that the regulations violate their Fifth Amendment right to freedom of choice in

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8. Women in the Military: An Unfinished Revolution, at 162 (1982).

family matters, create an unconstitutional irrebuttable presumption, and discriminate against them because they are women. In 1977 petitioners were certified to represent a nationwide class of "women applicants who have been or are being denied admittance into the Army or Air Force because of Army or Air Force policies that deny admittance to a single parent with a child under 18 years of age." Opinion and Order of the District Court, dated June 20, 1977.

On cross motions for summary judgment, the District court granted respondents' motion, ruling that the controversy was justiciable but rejecting all of petitioners' constitutional claims. Despite the ruling in favor of justiciability, the District Court failed to review petitioners' family right claim on the merits, stating merely that petition-

ers have no right to join the military.

On appeal, petitioners were supported by amici curiae American Veterans Committee, Comparable Worth Project, Committee on Children and the Law of the Association of the Bar of the City of New York, The Employment Law Center, The National Association for the Advancement of Colored People, National Coalition Against Domestic Violence, National Conference of Black Lawyers, National Political Congress of Black Women, Women's Equity Action League, and Women's Legal Defense Fund.

The United States Court of Appeals for the Second Circuit affirmed the opinion of the District Court in a per curiam opinion dated January 29, 1986, as amended March 5, 1986. The opinion did not mention the family right issue. Thus, although this case is now ten years

old, no court has reviewed the petitioners' claim that the Army and Air Force's exclusion of them from enlistment because they are single parents impermissibly interferes with the exercise of their fundamental right to have and raise a family.[9]

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9. Family rights challenges to the enlistment ban on single parents, brought in other circuits, have been dismissed because of doctrines of severely limited justiciability in military cases, Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981); West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978); Henson v. Alexander, 478 F. Supp. 1055 (W.D. Ark., 1979); Ayotte v. Secretary of Defense, No. 80-0328P (D. Me., Sept. 9, 1978). The Second Circuit properly considers petitioners' claim justiciable: petitioners were able to conduct discovery and to develop their claim. Thus, this is the only case in which a fully-developed record on the issue is likely to reach this Court. (The Third Circuit held a similar claim justiciable, Dillard v. Brown, 652 F.2d 316 [3rd Cir., 1981], but respondents settled the case.)

REASONS FOR GRANTING THE WRIT

I. RESPONDENTS' EXCLUSION OF SINGLE PARENTS FROM ENLISTMENT IMPERMISSIBLY INTERFERES WITH PETITIONERS' FUNDAMENTAL RIGHT TO HAVE AND RAISE A FAMILY

Freedom of choice in matters of family life is a fundamental liberty interest protected by the Due Process Clause. Santosky v. Kramer, 455 U.S. 745 (1982). This Court has long recognized the right of parents to raise and educate their children, Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925), Wisconsin v. Yoder, 406 U.S. 205 (1972), Stanley v. Illinois, 405 U.S. 645 (1972); and the right to form families, Skinner v. Oklahoma, 316 U.S. 535 (1942), Zablocki v. Redhail, 434 U.S. 374 (1978), even when those families do not conform to traditional expectations, Moore v. City of East Cleveland, 431 U.S. 494 (1977), Loving v. Virginia, 388 U.S. 1 (1967). The government may not favor

one family style over another by "forcing all to live in certain narrowly defined family patterns." Moore v. City of East Cleveland, 431 U.S. at 506; accord, Stanley v. Illinois, 405 U.S. at 651-652.

If a mother exercises her constitutional right to have and raise a family as a single parent, she is permanently foreclosed from the opportunity for military service. The government may not cut off employment opportunities even temporarily on the basis of choice of family life style. A school board could not require extended maternity leave, thereby curtailing a teacher's opportunity to work if she chose, because the state cannot "penalize the pregnant teacher for deciding to bear a child." Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 640 (1974). The lower courts have applied the same reasoning to cases involving other family rights. Dike v. School

Board of Orange County, Florida, 650 F.2d 783 (5th Cir. 1981) (circuit court reversed dismissal of case of school teacher who was not permitted to breastfeed her child on school property during the school day); Drake v. Covington Board of Education, 371 F.Supp. 974 (M.D. Ala. 1974) (three-judge court) (dismissal of unmarried pregnant schoolteacher held unconstitutional); Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976) (school district rule barring employment of unwed parents held unconstitutional).

A fortiori, the government's permanent denial to single mothers of the opportunity for military service violates the Constitution. Single mothers are forced to make a Hobson's choice between giving up their fundamental right to raise their children and permanently fore-

going an opportunity which includes a career, training, travel, veterans' benefits, and the honor and satisfaction of serving one's country.

Because respondents' regulations significantly infringe on petitioners' fundamental rights, they are invalid under the Due Process Clause unless they are closely tailored to effectuate the military's interest in deployability. Zablocki v. Redhail, 434 U.S. at 388; Moore v. City of East Cleveland, 431 U.S. at 499-500. The categorical exclusion of single parents is not a policy closely tailored - indeed, is not tailored at all - to promote these interests.

A constitutionally acceptable alternative to respondents' present regulations would be individualized screening of single parents through the enlistment process. The Army and Air Force already screen and test each applicant to deter-

mine his or her physical condition, mental ability and aptitude, educational background, stability, and character. The armed services should be required to determine for each single mother who applies whether she will be able to meet her military responsibilities, based on the needs of the service[10] and the mother's plans for the child's care while she is in the military. The District Court, citing the example of petitioner Thelma Barnes (discussed supra, at 13), termed her the "most dramatic single illustration" offered which "lends support to plaintiff's argument that, at the least,

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10. Deployment lead-times vary drastically among the services; for example, the Army Reserve gives female soldiers at least 14 days' warning even in the event of a worst-case war, Defendants' Third Supplemental Response to Plaintiffs' Third Set of Interrogatories and First Request for Production of Documents, reproduced at Joint Appendix 0828-0830, filed with the U.S. Court of Appeals for the Second Circuit.

single parent applicants should be reviewed on an individual basis." Mack v. Rumsfeld, 609 F.Supp. at 1569. (Emphasis added).

While it may be simpler for the military to employ the overbroad exclusion from enlistment of all single parents for the sake of administrative convenience, this Court has clearly found that such a goal is "insufficient to make valid what otherwise is a violation of due process of law," Cleveland Board of Education v. LaFleur, 414 U.S. at 647. The constitution "requires the [government] to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals." Id. Accord, Frontiero v. Richardson, 411 U.S. 677 (1973).

The military context of this case

does not alter this requirement: when a fundamental right is involved, a military regulation which burdens the exercise of that right will be upheld only if it is the necessary or least restrictive way to promote a compelling governmental interest. Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir., 1980), reh. denied, 647 F.2d 80 (9th Cir., 1980), cert. denied, 454 U.S. 855 (1981). This Court has explicitly held that a lower standard of review should not be applied to constitutional claims merely because they arise in a military context. Rostker v. Goldberg, 453 U.S. 57, 69 (1981) and 453 U.S. at 87, n.3 (Marshall, J., dissenting). The First Amendment refinement of the standard of review adopted by the majority in Goldman v. Weinberger, 54 U.S.L.W. 4298 (March 25, 1986), does not extend to the substantive guarantee of due process at issue in this case. However, even if a low-

ered standard of review were to be applied to petitioners' family right claim, petitioners would prevail because, as the U.S. General Accounting Office found, the respondents do not have data to justify their categorical exclusion of single mothers from enlistment, see discussion at 12 and n.5, supra.

II. PETITIONERS' FAMILY RIGHT CLAIM IS ENTITLED TO A REVIEW ON THE MERITS

The District Court made no finding whatsoever as to any of the factual or legal arguments presented by petitioners in support of their family right claim. Rather, the court rejected that claim outright, stating in one sentence that petitioners have no constitutional right to join the military. Mack v. Rumsfeld, 609 F.Supp. at 1564. The Second Circuit affirmed the judgment below for "substantially the same reasons." Thus, pe-

titioners' constitutional claim about a policy which deeply affects their lives and the lives of thousands of other Americans has received no review at all from any court.

There is no justification for this failure to review. The military do not have carte blanche to interfere with fundamental constitutional rights without scrutiny from the courts. Goldman v. Weinberger, 54 U.S.L.W. 4298 (March 25, 1986). That petitioners have no right to join the military is irrelevant; petitioners make no such claim. Rather, the proper inquiry in this case is the extent to which respondents' regulations burden the exercise of petitioners' fundamental right to have and raise a family. If the single parent exclusionary policies "significantly interfere" with petitioners' constitutionally protected right to raise

their children and to choose their family life style, the policies cannot be upheld unless they are closely tailored to effectuate compelling governmental interests. Zablocki v. Redhail, 434 U.S. at 388.

This case involves broad sociopolitical judgments which implicate the basic constitutional right to have and raise a family. The challenged regulations do not reflect the technical judgment of military professionals about internal governance matters such as the administration of military bases, Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), or the need for uniform dress codes, Goldman v. Weinberger, 54 U.S.L.W. 4298 (March 25, 1986). Petitioners' claims do not involve the extent to which individual autonomy must be tolerated "within the military community."

Goldman v. Weinberger, 54 U.S.L.W. at 4299, citing Parker v. Levy, 417 U.S. 733, 751 (1974). Rather, this case raises the threshold question of who may join that community. The decision to categorically exclude an entire segment of the population from military service is political, not technical.[11] Were the military to categorically exclude blacks or Jews from enlistment, the courts would not simply defer to their judgment. Petitioners are entitled to a judicial review of their claim.

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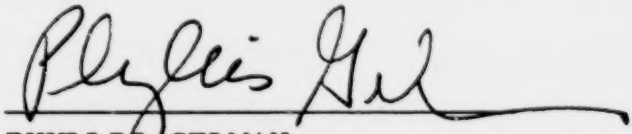
11. Deposition of Robert Burns Pirie, Jr., Assistant Secretary of Defense, 1979-1981, reproduced at Joint Appendix 0083, filed with the U.S. Court of Appeals for the Second Circuit.

CONCLUSION

Wherefore, petitioners pray that this Court issue a writ of certiorari to the Second Court of Appeals to review its judgment.

Dated: April 28, 1986
New York, New York

Respectfully submitted,



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No. CIV 76-22C
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CARLENE MACK, Individually and on behalf of all persons similarly situated; PATRICIA RAMSURE; QUEEN ESTHER TAYLOR; THELMA BARNES; MAXINE McNEILL; TRINA LEWIS,

Plaintiffs,

vs.

DONALD RUMSFELD, Individually and in his official capacity as Secretary of Defense; MARTIN R. HOFFMANN, Individually and in his official capacity as Secretary of the United States Army,

Defendants.

APPEARANCES:

NATIONAL CENTER ON WOMEN & FAMILY LAW (PHYLLIS GELMAN, ESQ., of Counsel), New York, New York,

GREATER UPSTATE LAW PROJECT (JAMES I. MEYERSON, ESQ., of Counsel), New York, New York,

-and-

AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION (BRUCE A. CAMPBELL, ESQ., of Counsel), Columbus, Ohio, for Plaintiffs.

UNITED STATES ARMY, Office of the Judge Advocate General, Litigation Division (LT. COLONEL JOYCE PETERS, ESQ., of Counsel), Washington, D.C.,

UNITED STATES AIR FORCE, Office of the Judge Advocate General, General Litigation (LT. COLONEL GUY STERNAL, ESQ., of Counsel), Washington, D.C.,

-and-

SALVATORE R. MARTOCHE, ESQ., United States Attorney (KATHLEEN MEHLTRETTER, ESQ., Assistant United States Attorney, of Counsel), Buffalo, New York, for Defendants.

Plaintiffs challenge the policy of the Army, Army Reserve, Air Force, and Air Force Reserve which prohibits the enlistment, with rare exceptions, of single parents with children under 18 years old. They contend that it violates their rights under the fifth amendment. This case was certified as a class action on June 20, 1977. The named plaintiffs represent the class of

> women applicants who have been or are being denied admittance into the Army or Air Force because of Army or Air Force policies that deny admittance to a single parent with a child under 18 years of age.

Defendants originally moved for summary judgment in June of 1976. This court denied that motion on February 10, 1978, with leave to renew after additional discovery had taken place. Defendants renewed their motion in June of 1983. Plaintiffs

have filed a cross motion for summary judgment.

Plaintiffs attack the constitutionality of the regulations expressing the single parent exclusion policy (see Appendix). Plaintiffs list three counts in their complaint. Plaintiffs' first count charges that the Army and Air Force unjustifiably discriminate against unmarried parents of children under the age of 18. As their second count, plaintiffs allege that defendants' policies penalize plaintiffs for exercising their freedom of choice as to family life and that those policies erect an irrebutable presumption as to the fitness of single parents for military service. Plaintiffs claim that these policies discriminate against women as their third count. (See Amended and Supplemental Complaint, March

22, 1977).

Both plaintiffs and defendants have filed extensive exhibits with the court in support of their motions for summary judgment and in opposition to the motions against them. Plaintiffs have submitted, among other things, depositions of their experts, portions of military studies and records, and affidavits from named plaintiffs and others.

Defendants have offered policy statements, military studies, depositions of military personnel and copies of the regulations at issue as they have been amended over the years.

For the reasons that follow, summary judgment is granted to defendants and the complaint is dismissed.

Preliminarily, defendants argue that

this case is nonjusticiable and/or non-reviewable. It appears to the court that these terms are used interchangeably in this context. Defendants also raised this point in their original motion for summary judgment, and the court held that the case was justiciable in its order of February 10, 1978. At that time, the court relied upon Crawford v. Cushman, 531 F.2d 1114, 1121 (2d Cir. 1976), in which it was held that substantive claims of constitutional dimension against the military are reviewable by the courts. Plaintiffs in this case have raised substantive claims of violations of equal protection and due process as guaranteed by the fifth amendment to the United States Constitution.

Defendants point out that, since the time of this court's 1978 order, several

courts of appeals have adopted the approach established by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), in testing the reviewability of military decisions. Under this test, a court should examine four factors: 1) The strength of the plaintiff's claim; 2) potential harm to plaintiff if review is denied; 3) type and degree of anticipated interference with the military; and 4) the extent to which military expertise is involved. Using this test, two courts of appeals have found the same policies at issue in this case not proper for review. See West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 126, and Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981).

The Third Circuit, however, has rejected the Mindes test and found the same

policies challenged here to be reviewable. Dillard v. Brown, 652 F.2d 316 (1981).

> Once a claim falls within these parameters [a constitutional or statutory violation], a court should review the claim on the merits. Even if such a constitutional challenge appears weak or frivolous, jurisprudentially that claim should be rejected on the merits, rather than deemed to be non-justiciable by a federal court. We prefer an analysis which does not mingle concepts of justiciability with those affecting the merits of the claim to the extent that Mindes requires.

Id. at 323.

Crawford is still the law of this circuit (see Katcoff v. Marsh, 755 F.2d 223, 233 (2d Cir. 1985)).

Plaintiffs have raised constitutional equal protection claims and due process claims, and under Crawford and the reasoning of Dillard these claims are justi-

ciable and reviewable.

The Supreme Court's decision in Rostker v. Goldberg, 453 U.S. 57 (1981), does not remove this case from the realm of reviewability. That case emphasized the deference due Congressional decisions involving the military and national defense. The court pointed to Congress's broad constitutional power to raise and support armies, citing Art. I, §8 of the United States Constitution. It stated that courts have an ultimate responsibility to decide constitutional questions, adding, "deference does not mean abdication." Id. at 67 and 70.

That courts have the power and the duty to review military conduct when challenged as violative of the Bill of Rights is clear. The standard of review, however, is far from clear. The military urges that, at

most, this court may simply glance at the challenged policies to determine if there is a "rational nexus" between the exclusion of single parents and military readiness. In a recent case from the Eastern District of New York involving a naval reserve policy prohibiting the commissioning of pregnant cadets, the court interpreted Rostker as requiring mere rationality to withstand a claim of gender discrimination under the fifth amendment. Cobb v. United States Merchant Marine Academy, 592 F. Supp. 640, 643-44 (E.D.N.Y. 1984).

In Rostker, the Court apparently declined to adopt such a test:

> We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government. Announced degrees of "deference" to legislative judg-

> ments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred. Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.

Rostker at 69-70.

The Second Circuit has provided an interpretation of the Rostker decision in a slightly different context. In Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985), two taxpayers sought an injunction against Congress's continuation of the Army's military chaplain program, claiming that government

financing of the program violated the establishment clause of the first amendment. Citing Rostker, the court said:

> The line where military control requires that enjoyment of civilian rights be regulated or restricted may sometimes be difficult to define. But caution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.

Katcoff at 234.

This court is well aware that the policies under attack here were not promulgated by Congressional act, but by military regulation. Yet the Supreme Court has

held that military policies made under an explicit grant of Congressional authority are entitled to deference. See Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 890-91, 894 (1961). Here, the military defendants set enlistment requirements through the authority of Congress, which gave the Secretaries of the Army and Air Force the power to promulgate enlistment standards. 10 U.S.C. §§505, 510(b), 3012(g), 8012(f). Goldman v. Secretary of Defense, 734 F.2d 1531, 1538 (D.C. Cir. 1984).

In light of the above discussion of the standard of review, this case is amenable to summary judgment. Both parties have engaged in extensive discovery and neither requests additional time. In fact, both ask the court to decide the case on summary

judgment, because a trial will add little, if anything, to the record.

Plaintiffs claim the exclusionary policy violates their fundamental constitutional right to freedom of choice in family matters and creates an irrebutable presumption as to the fitness of single parents for military service, all in violation of the due process clause of the fifth amendment. The regulations at issue here, however, do not interfere with plaintiffs' constitutional right to have, or not to have, a family. They simply prohibit plaintiffs, as single parents, from enlisting in the Army or Air Force. There is no constitutional right to join the military. Lindenau v. Alexander, 663 F.2d at 72-73, and Crawford v. Cushman, 531 F.2d at 1125.

As their first and third counts,

plaintiffs claim the single parent exclusion policies discriminate against them as single parents and as women, in violation of the equal protection clause of the fifth amendment.

Under the Second Circuit interpretation in Katcoff, the exclusion policies shall be treated as presumptively valid and constitutional if they are reasonably relevant and necessary to further national defense.

Defendants maintain that these policies are relevant and necessary to the critical concerns of military readiness and mobility. They offer the depositions of several military leaders as well as military studies based on the results of surveys of commanders, supervisors, and married couples with children, both of whom are in the mili-

tary, or single parents.

For instance, Major General H. Norman Schwarzkopf, Director for Military Personnel Management and Acting Assistant Deputy Chief of Staff for Personnel at the Pentagon, was deposed by defendants in November of 1982. He stated that a key concern of the military is the ability to deploy forces in the United States overseas as rapidly as possible. Single parents, according to the General, pose a threat to the Army's ability to mobilize quickly. He admitted that a detailed analysis of the numbers of single parents who might not be prepared to deploy has not been done, since it is "not a question of numbers," but of the "war-fighting capability of the Army." (Item 146, p. 39)

General Schwarzkopf served as the

Assistant Division Commander of the Eighth Infantry Division and Community Commander of Mainz Military Command in Germany from 1970 to 1972. He was in charge of personnel management for 12,000 people in a U.S. Army community. He estimated that approximately 100 single parents lived in the community and said that some were deficient in performance. While he had no exact numbers, he said that the percentage of single parents who failed to report for alerts was "dramatically different" from the percentage of other soldiers. General Schwartzkopf recalled that division commanders repeatedly mentioned the availability of single parents as a matter of concern (Item 146, pp. 15-16).

Major General Kenneth LeRoy Peek, Director of Personnel Plans for the Air

Force, served as Vice Commander, then as Commander, of the Air Force Manpower and Personnel Center at Randolph Air Force Base from March of 1979 until July of 1982. In that position, he encountered a "significant amount of concern" on the part of local commanders, supervisors and first sergeants about the difficulties some single parents had in meeting duty requirements. (Item 147, pp.9-11).

Other military leaders pointed to the serious problems single parents encounter during basic and technical training. (See Deposition of Air Force Lt. General B. L. Davis, Item 49, pp.11 and 22, and Deposition of Air Force Lt. Colonel Donald Post, Item 50, pp.13-15).

Defendants also submitted military studies which in part dealt with single par-

ents. For example, a report by the Women in the Army Study Group was prepared in December 1976 (Defendants' Exh. K). Comments solicited from major army commands formed the basis of the study. They were requested to determine whether single parents, both male and female, had a bad effect on unit readiness.

Some units reported no problems with single parents when there were only a few involved, but noted serious problems when significant numbers of single parents were in a unit. Specifically, single parents did not have the flexibility to work irregular hours or different work schedules. They also were said to need considerable advance warning before extended leave (Exh. K, Chap. 7, pp.8-9).

From October 1980 through April

1981, the Air Force studied the readiness and availability of single parents (Report of the Availability of Single Member Sponsors and Military Couples with Dependents, Defendants' Exh. G.).

Military leaders, single parents, and military couples with children were interviewed in 27 Air Force bases. The focus of the survey was AF 35-59, an Air Force regulation dealing with provisions for child care. The results of the study showed that commanders strongly believed that single parents and military couples with children were not prepared to deploy on short notice. Younger, less experienced single parents and military couples with children tended to view themselves as less available and the chances of being called upon to deploy as less likely than did more

experienced single parents or military couples.

The report concluded that the current stringent waiver policies for enlistment of single parents and military couples with children should be continued. It recommended that the policy of discharging those who become single parents and are not available be enforced (Defendants' Exh. G., pp.4-5).

Another one of the many Air Force studies also based on surveys, found that many commanders believed that single parents lost more time than military couples with children or Air Force personnel with civilian spouses (see Study by Air Force Manpower and Personnel Center, January 1982, Defendants' Exh. H, p. 24).

Plaintiffs maintain that defendants'

policies of retaining enlisted personnel who become single parents are fundamentally inconsistent with their position. They argue that if defendants were truly concerned about single parents disrupting mobilization and readiness, no amount of investment in training or gain in maturity and experience would justify retaining those who become single parents. (Item 169, pp.103-04).

What plaintiffs fail to take into account is that single parents whose performance deteriorates can be either discharged or barred from reenlistment (see Item 146, pp.39-41, Deposition of Army Major General Schwarzkopf). In fact, The U.S. General Accounting Office [GAO] Report to the Secretary of the Army dated September 13, 1982, recommended that the Army forego discharging

all those who become sole and in-service parents or assigning them to positions coded as "nondeployable" until further study.

As noted earlier, the Air Force report on the availability of single parents (Defendants' Exh. G) recommended enforcement of the policy of discharging those who are not consistently available as well as recommending maintaining stringent restrictions on the enlistment of single parents.

Major General Schwarzkopf pointed out that those who become single parents while serving are not automatically discharged because they, unlike new enlistees, represent a valuable resource to the military due to their training and experience (Item 146, pp.39-41).

Certainly, defendants' refusal to automatically discharge soldiers and Air

Force personnel who become single parents does not indicate that barring the enlistment of single parents on the basis of a need to sustain maximum readiness and mobility is pretextual. The military has no investment in those who seek enlistment, nor any commitment to them. Those who have been in the service have training and experience and can be discharged or reassigned if their performance declines.

Plaintiffs also urge that the repeated linkage of single parenthood with women's issues reveals that the policies were motivated in part by a discriminatory purpose.

A perusal of defendants' exhibits shows that single parenthood is frequently associated with women's issues. For example, defendants' Exhibit H, a report by

the Air Force Manpower and Personnel Center, utilized written surveys. The first portion of these surveys asked commanders to evaluate the performance of female enlistees and of male enlistees. Another segment of the survey asked questions about the performances of single parents and military couples with children. A latter segment inquired about pregnancy (see Exh. H, Appendix B).

Single parenthood was also addressed by the Army as a women's issue. Defendants' Exhibit I, an opinion survey on the role of women in the Army, links pregnancy and sole parenthood. Exhibit K, although explicitly referring to the sole parent issue as applying to both men and women (Chap. 7, p.8) was prepared by the Woman in the Army Study Group, which viewed it in part as a issue

related to pregnancy (p.1-A-6).

A 1981 Department of Defense Report, Background Review: Women in the Military, stated, "Sole parents, whose numbers are increasing in the military, are frequently thought to be a female issue." (Defendants' Exh. 22 at 7.) Plaintiffs' expert, Kathleen Carpenter, who was Deputy Assistant Secretary of Defense of Equal Opportunity in the Office of Secretary of Defense during the Carter administration, affirmed this. She testified at a deposition that the single parents issue was considered to be a woman's issue (Plaintiffs' Exh. 7, p. 23). Plaintiffs' expert, Kurt Lang, a professor of Sociology at State University of New York at Stoney Brook, notes that single parenthood continues to be associated with illegitimacy and a dissolute lifestyle (Plaintiffs' Exh.

12, p. 8).

While the plaintiffs have indeed demonstrated a frequent linkage of single parenthood with pregnancy and women's roles in the military, this alone does not make the regulations unconstitutional. Plaintiffs have not shown that the regulations exist in part "because of" and not just "in spite of" their adverse effects on women. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). (Defendants have agreed, for the purposes of summary judgment, to assume the challenged regulations, while facially neutral, have a disparate impact on women.)

As defendants point out, the military has placed restrictions on the peacetime enlistment of people with dependents since 1841, 107 years before women were

admitted into the armed forces. These regulations changed in content and restrictiveness over the years but usually were in force, in one form or another, throughout this period (see Item 158, Appendix A, and Defendants' Exhibit A). The military's concern about enlisting those with dependents has long been evident and, historically at least, was unrelated to gender.

Furthermore, the military places quotas on the number of women allowed to enlist. Such quotas could be used to directly reduce the number of women enlisting without resort to a single parent subterfuge. Of course, this in itself does not demonstrate that defendants were not employing a facially neutral statute for a discriminatory purpose, but it lends support to defendants' position.

Even if plaintiffs could make a showing of discriminatory purpose, more would be required.

Plaintiffs claim defendants have not shown that the regulations are substantially related to important governmental objectives, the test in gender equal protection cases (Item 169, Plaintiff's Brief at p.96, citing Craig v. Boren, 429 U.S. 190, 197 (1976)). However, as stated above, in light of Rostker and the Second Circuit's interpretation in Katcoff, the question in the military context is simply whether the challenged regulations are reasonably relevant and necessary to the national defense.

Plaintiffs offer depositions and affidavits indicating that defendants failed to engage in any detailed statistical analysis to determine the actual quality of work

by single parents in comparison to other personnel. Plaintiffs claim the potential effect of single parents on readiness and the ability to deploy quickly in the event of an emergency has never accurately been gauged. The policies challenged here, they say, are not founded on social science studies but the intuition of military leaders (Item 169, p. 17).

Plaintiffs rely primarily on the critique by their expert, Professor Lang, to highlight the deficiencies in military studies of the single parent issue and to show the absence of evidentiary validation for these policies.

Professor Lang concluded that military studies do provide evidence that some single parent service members have difficulty meeting their peacetime duties and

that some of these problems are certainly related to inadequate child care. Yet, he also believed that the studies show that the large majority of single parents are performing at least satisfactorily (Plaintiffs' Exh. 12, p.1).

One of Professor Lang's main contentions is that studies based on the opinions of military commanders with responsibility for national security tend to exaggerate the magnitude of the problem. (Plaintiffs' Exh. 12, p.9). He notes that many command centers surveyed by the Army in 1976 (Defendants' Exh. T) reported only minor problems with single parents, which could be dealt with on an individual basis. (Plaintiffs' Exh. R, p. 17-19). In fact, Professor Lang believes that when the results of the surveys are tabulated, they show that single

parenthood "does not result in an excessive loss of time or create major problems that cannot be handled in the framework of regulations." (Id. at 19.)

However, single parents need not cause an excessive loss of time or create major problems to make the regulations excluding them reasonably relevant and necessary to the national defense.

Professor Lang also pointed out that interview or survey questions are broad-based, biased in that they link single parenthood to women and sometimes phrase the issue as a "problem," and rely on "self-reports," by single parents, which he claims are of doubtful validity (Exh. 12).

Professor Lang's concerns are echoed by Robert Pirie, Jr., Director of the Naval Strategy Program at the Center for Naval

Analyses. From 1979 to 1981, he was the Assistant Secretary of Defense for Manpower Reserve Affairs and Logistics. He noted that there are analytical studies available to obtain objective information about the magnitude of the single parent problem. (Plaintiffs point out that the military customarily relies on detailed statistical analysis when examining issues relating to enlistment.) Mr. Pirie indicated that he would prefer to "utilize both statistical analyses and reports of commanders, as have been relied on in the past, to formulate a single parent policy. In his experience, analytical studies frequently contradict the intuition of military leadership. Mr. Pirie did not know whether this would be the case with the single parent policies (Plaintiffs' Exh. 5, pp. 38-39).

Perhaps the strongest support for plaintiffs on this issue comes from defendants. In 1982, the GAO prepared a report to the Secretary of the Army entitled "Army Needs Better Data to Develop Policies for Sole and Inservice Parents" (Defendants' Exh. N).

The report was based on questionnaires sent to first-line supervisors at Fort Bragg and Army installations in Europe. Professor Lang pointed out that studies based on evaluations by direct supervisors were more valid than those based on interviews with commanders (Plaintiffs' Exh. 12, p.21). Based on these responses, the GAO concluded that sole and in-service parents attended and performed at least satisfactorily and would most likely be available in the event of war (Defendants' Exh. N, p.4).

The study recommended that the Army forego discharging all who become single parents or a military couple with children until objective and scientific data is obtained. It also recommended that data be developed to "reconsider the reasonableness of restricting enlistment of sole and in-service parents." (Defendants' Exh. N, p. 11.)

The court agrees that better, more reliable techniques for assessing the day-to-day performance and the likely availability of single parents in time of national crisis should be implemented, particularly in light of the GAO report to the Secretary of the Army in 1982 (Defendants' Exh. N). However, the Rostker decision and the interpretations provided by the D.C. Circuit in Goldman v. Secretary, 734 F.2d 1531, and by the Second Circuit in Katcoff place a mini-

mal burden on the military in defending its policies against constitutional attack. The policies need only be "reasonably relevant and necessary to furtherance of our national defense," and "any doubt as to its constitutionality should be resolved . . . in favor of deference to the military's exercise of its discretion." Katcoff at 234.

Defendants have provided the court with evidence, as discussed above, that there are problems with some single parents in flexibility with duty schedules and reporting for duty on short notice. These problems create concern on the part of many military leaders that single parents will not be available in the event of an emergency. Also, Air Force commanders discussed the burdens of single parents during basic and technical training.

The court has been presented with a challenge to the constitutionality of single parent enlistment restrictions only, not the regulations providing for the ouster or reassignment of trained personnel who become single or in-service parents after enlistment. Based on defendants' evidence, I cannot conclude that a policy barring single parents from military service at the enlistment level is not reasonably relevant to and necessary for the furtherance of the national defense.

Plaintiffs point out that the military provides child care facilities to personnel who are already enlisted (Exhs. 43 and 44). They note that these services could be expanded. Strict enforcement, they say, of regulations requiring discharge for military parents who are performing poorly

and regulations requiring the maintenance of careful dependent care planning would be an alternative to a blanket prohibition against single parent enlistment. See Katcoff at 235.

Plaintiffs also suggest that prohibiting single parents from bringing their children to basic or technical training would be a reasonable alternative. Plaintiffs even urge that current regulations limiting the locations to which a service member may bring children be extended to cover single parents, with perhaps more rigid limitations on single than married parents (Plaintiffs' Brief, Item 169, pp.128-29).

Again, however, plaintiffs skim over the difference between those who have already undergone training and have experi-

ence and those who are attempting to enlist. As discussed earlier, simply because the military provides child care services to trained personnel does not mean it is required to provide such services for those who are seeking to enlist. A common theme from the evidence submitted by defendants is a concern with the growing number of single parents and military couples with children and a belief that the greater the number, the greater the potential that readiness would be undercut. Under these circumstances, admitting those who are already single parents would increase the burden.

Plaintiffs have not shown that setting a lower age limit for dependents, rather than age 18, would significantly alleviate these problems. Nor does setting the age limit at the level at which commer-

cial airlines permit minors to fly unaccompanied present a practical solution.

The most dramatic single illustration offered by plaintiffs supporting individual waivers involves named plaintiff Thelma Barnes. Ms. Barnes and her sister enlisted in the Army Reserves on the same day. Each had a child, but only the sister was married. Although Ms. Barnes transferred guardianship of her child to her mother, her enlistment was voided under the regulations then in force. Her sister, although she was married, relied on their mother to care for her child, as Ms. Barnes would have. The sister remained in the Reserves was promoted to sergeant (see Exh. 17). This lends support to plaintiffs' argument that, at the least, single parent applicants should be reviewed on an indi-

vidual basis.

It should be noted that both the Army and the Air Force had experimented with more liberal restrictions on the enlistment of single parents, permitting waivers for single parents if the application was "meritous" or if they could provide a detailed dependent care plan. Both the Army and Air Force had liberalized policies for a period in the early 1970s. The Air Force made another attempt from 1978-81. Both branches returned to the stringent regulations, such as those which barred the enlistment of the named plaintiffs, because the liberalized enlistment requirements were perceived to impair the readiness of the military and create problems in training. (see pp.14-24, Item 158).

Finally, plaintiffs urge the court

to consider differences between the Army and Air Force and between the active branches and the reserves. Although the Army and Air Force do have differences in their functions and needs, each has provided evidence, in the form of depositions and studies, that single parents pose some threat to readiness and mobility.

Plaintiffs' point as to the reserves has more appeal at first glance. Reservists live in civilian communities and are called upon only occasionally to report for duty. The purpose of the reserves is to be active in the event of war. Major General Paul S. Williams, Army Director of the Office of the Deputy Chief of Staff, cautioned that, although less time is required of the reserves during peacetime, there may be a need for sudden mobilization (Item 51,

pp.34-36). Robert Pirie, Jr., described the "total force concept," in which the active Army (Air Force) and its reserves are viewed as one force. He stated that, in the event of an emergency, the reserves would be required to deploy in accordance with schedules which would be just as stringent as those of the active Army or Air Force (Plaintiffs' Exh. 5, pp.57-59). In light of this, regulations proscribing single parent enlistment in the active forces would be equally valid for the reserves.

Plaintiffs' motion for summary judgment is denied. Defendants' motion is granted, and the complaint is dismissed.

So ordered.

/s/ John T. Curtin
United States District Judge

Dated: June 5, 1985

APPENDIX

A.

ARMY AND RESERVES

Army Regulation AR 601-210
Effective April 1, 1975, and continued July 28, 1976

Same as Army Reserve Regulation AR 140-111, Effective May 1, 1975

RULE F--DEPENDENTS
IF APPLICANT IS
Without Prior Service . . .

(2) An applicant without a spouse and with one or more dependents under 18 years of age is disqualified, except as provided in (3) and (4) below. No waiver is authorized.

(3) A divorced applicant may be processed for enlistment when the child or children have been placed in the custody of the other parent by court order and the applicant is not required to provide child support. No waiver is required.

(4) A divorced applicant may be processed for dependency waiver when the child or

children have been placed in the custody of the other parent by court order and the applicant is required to provide child support.

Army Regulation AR 601-210
Effective November 1, 1980, as amended December 1, 1980

F--DEPENDENTS
With or without prior service

2. An applicant "without a spouse" --

a. who has "dependent(s)" under 18 years of age who has been placed in the custody of the other parent or another adult by court order, or as provided by state law and the applicant is

(1) not required to provide child support or required by court order to provide child support for 2 or less "dependent(s).""

(2) required by court order to provide child support for three or more "dependent(s)."

b. who has "dependent(s)" under 18 years of age who has not been placed in the custody of the other parent or another adult by court order or as provided by state law.

Eligibility Status

a. (1) Eligible

(2) Not eligible; waiver requests considered.

b. Not eligible; waiver requests not considered.

Army Reserve Regulation AF 140-111
Effective February 1, 1979

RULE F--DEPENDENTS
IF APPLICANT IS
Without Prior Service

(2) An applicant without a spouse and with one or more dependents under 18 years of age is disqualified, except as provided in (3) and (4) below. No waiver is authorized. An applicant without a spouse is defined as an applicant who is unmarried, is divorced,

is legally separated, spouse is deceased, spouse has deserted applicant, spouse is incarcerated, spouse is not residing permanently with applicant, or applicant has sole custody of the dependents.

(3) An applicant without a spouse may be processed for enlistment when the child or children have been placed in the custody of the other parent of the child or children by court order and the applicant is not required to provide child support. No waiver is required.

(4) An applicant without a spouse, required to pay support for no more than two dependents under 18 years of age and where said dependents have been placed in the custody of the other parent of the child or children by court order, may be processed for enlistment without a waiver. If there are more than two dependents, a waiver is required prior to enlistment.

Army and Army Reserves combined Regulation AR 601-210
Effective October 1, 1982, through date of decision

2. An applicant "without a spouse"--

a. Who has "dependent(s)" under 18 years of age who has (have) been placed in the custody of the other parent or another adult by court order or as provided by State law and the applicant is--

(1) Not required to provide child support or required by court order to provide child support for two or less "dependents."

(2) Required by court order to provide support for three or more "dependents."

(3) Servicemembers who have surrendered custody of dependents under this rule will certify at the time of enlistment that it is their intent that the custody agreement will survive the term for which enlisting; servicemembers who

enlist subject to this provision and who regain custody of their children during the term of enlistment will be processed for involuntary separation for fraudulent enlistment unless they can show that the regaining of such custody is not contrary to the intent stated upon enlistment.

b. Who has "dependent(s) under 18 years of age who has (have) not been placed in the custody of the other parent or another adult by court order or as provided by State law.

Eligibility

(1) Eligible.

(2) Not eligible; waiver requests considered.

(3) Eligible; DA Form 3286-31R (Fig. 2-1) will be executed at the time of enlistment. DA Form 3286-31R will be locally reproduced on 8½ x 11-inch paper.

b. Not eligible; waiver requests not considered.

B.

AIR FORCE AND AIR FORCE RESERVES

AFR-33-3
Effective March 31, 1975

Applicants are ineligible to enlist if one of the following conditions exists

* * *

15. Applicants with one or more dependents under age 18 but without a spouse in household (note 4.) (Not applicable for enlistment in the ROTC or OTS programs.)

4. See paragraph 1-1j for definition of dependent. Dependency waivers may be requested:

a. When dependents have been placed by court order into the custody of some other person (irrespective of applicant's responsibility to provide child support payments), or

b. For former Air Force members separated for pregnancy who apply for reentry within 1 year of date of separation.

AFR 33-3
Effective October 14, 1977

Applicants are ineligible to enlist when one of the following conditions exist

* * *

12. Applicant with one or more dependents under age 18 but without a spouse in household or with a common-law spouse (see notes 2 and 5). (Not applicable for enlistment in the Officer Training School or Prior Service programs.)

NOTES:

2. See paragraph 1-1h for definition of dependent. Dependency waivers may be requested:

a. When dependents have been placed by court order into the custody of some other person (irrespective of applicant's responsibility to provide child support payments) or

b. When dependents have been placed for an indefinite period of time in the physical care, custody, and

control of a person who has been authorized by the parent's notorized [sic] Certificate of Child Care Arrangements to act on behalf of the dependent(s). The custody period involved will vary based on job assignment and will cover basic military training and technical training, if required. Additionally, it is recommended that the dependent(s) not join the parent at initial duty station until such a time as the parent has adjusted to the job and military base environment and made full arrangements for child care.

c. No waiver is required if applicant can prove permanent transfer of legal control to some other person through court order or adoption proceedings, provided actual transfer of legal control over the child(ren) has occurred. Child(ren) must still be listed on enlistment documents and present status explained. Documents (court order or adoption papers) must be reviewed by the recruiter and AFEES I NCO. An AF Form 3010,

Statement of Understanding (Dependency) must still be signed by the applicant.

5. An applicant with minor children and a common-law spouse should be considered to be enlistment eligible if both parties are bona fide domiciled in a State recognizing common-law marriage, at the time they enter into such relationship. Waivers for enlistment under this situation are processed to the Recruiting Service Squadron Commander for approval.

ATCR 33-2
Effective August 31, 1982

(a) In the case of an applicant having any minor dependents and NO SPOUSE IN THE HOUSEHOLD, waiver is authorized if care, custody, and control of minor dependents have been assumed by another individual via court order. In addition, the applicant must complete a handwritten statement using ATC Form 1357, Dependent Care Statement regarding plans for post-enlistment care. Divorced or separated applicants must provide a plan should they be required to resume custody.

(b) Waivers may be considered only where custody of minor dependents has been transferred by court order to another person.

1. Bonafide court orders are the only acceptable documents that can be used to prove transfer of custody. Applicants must provide an original order (or copy) authenticated by a court official.

2. Evidence of custody transfer must show that it is unconditional and contain no conditions under which the applicant would resume custody during the initial term of service.

3. When an applicant claims or acknowledges to be the parent of an illegitimate child and no court order was or will be issued, a written agreement to pay child support and (or) an affidavit from the custodial parent establishing unconditional custody of the child with parties other than the applicant may be sufficient proof. Use of such documents apply only where court orders were not issued.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 677—August Term, 1985

(Argued December 16, 1985 Decided January 29, 1986)

Docket No. 85-6184

CARLENE MACK, Individually and on behalf of all other persons similarly situated; SHIRLEY STUKES; PATRICIA RAMSURE; QUEEN ESTHER TAYLOR; THELMA BARNES; MAXINE MCNEILL; and TRINA LEWIS, Intervenor,

Plaintiffs-Appellants,

—v.—

DONALD RUMSFELD, Individually and in his official capacity as Secretary of Defense; MARTIN R. HOFFMAN, Individually and in his official capacity as Secretary of the United States Army; THOMAS C. REED, Individually and in his official capacity as Secretary of the United States Air Force,

Defendants-Appellees.

Before:

TIMBERS, MESKILL and PRATT,

Circuit Judges.

Appeal from order of the United States District Court for the Western District of New York, Curtin, *C.J.*, granting defendants' motion for summary judgment and dismissing plaintiffs' complaint.

JAMES I. MEYERSON, New York City (of counsel to Greater Upstate Law Project, Rochester, New York), Phyllis Gelman, Margaret Klaw, New York City (of counsel to Greater Upstate Law Project, Rochester, New York and National Center on Women & Family Law, New York City), *for Plaintiffs-Appellants.*

Bruce Campbell, American Civil Liberties Union of Ohio Foundation, Columbus, Ohio, *for Plaintiff-Appellant-Intervenor Lewis.*

LINDA SILBERMAN, Civil Division, Department of Justice, Washington, D.C. (Richard K. Willard, Assistant Attorney General, Department of Justice, Washington, D.C., Salvatore R. Martoche, United States Attorney for the Western District of New York, Buffalo, New York, Guy J. Sternal, Lt. Col., USAF, Craig Niederpruem, Major, JAGC, Office of The Judge Advocate General, Washington, D.C., John Cordes, Civil Division, Department of Justice, Washington, D.C., of counsel), *for Defendants-Appellees.*

Nancy Polikoff, Women's Legal Defense Fund, Washington, D.C., Carolyn A. Kubitschek, Hofstra University School of Law, Hempstead, New York, *for Amici Curiae, American Veterans Committee; Comparable Worth Project; Committee on Children and the Law, Ass'n of the Bar of the City of New York; The Employment Law Center; The Nat'l Ass'n for the Advancement of Colored People; Nat'l Coalition Against Domestic Violence; Nat'l Conference of Black Lawyers; Nat'l Political Congress of Black Women; Women's Equity Action League; and Women's Legal Defense Fund.*

Per Curiam:

This is an appeal from an order of the United States District Court for the Western District of New York, Curtin, *C.J.*, granting defendants-appellees' motion for summary judgment and dismissing plaintiffs-appellants' complaint.

The seven named appellants are single mothers with custody of children under eighteen years of age. Six of them brought this class action suit in 1976 challenging the constitutionality of Army and Air Force regulations that prevented them from enlisting in the regular Army or Air Force or in the Army or Air Force Reserves. A class of female applicants denied admittance into the Army or Air

Force because of these regulations was certified in June 1977.

A defense motion for summary judgment dismissing the complaint was denied in 1978 with leave to renew. The motion was renewed in June 1983 and appellants filed a cross-motion for summary judgment in February 1984. On June 5, 1985, Chief Judge Curtin granted appellees' motion, denied appellants' motion and dismissed the complaint, finding the case justiciable, but rejecting all of appellants' constitutional claims on the merits. *Mack* v. *Rumsfeld*, 609 F.Supp. 1561 (W.D.N.Y. 1985).

We affirm substantially for the reasons set forth in Chief Judge Curtin's opinion. The district court opinion states that "*Crawford* [v. *Cushman*, 531 F.2d 1114 (2d Cir. 1976)] is still the law of this circuit . . . ." 609 F.Supp. at 1563. We note that *Crawford* has been substantially limited by the subsequent Supreme Court opinion in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), and our interpretation of *Rostker* in *Katcoff* v. *Marsh*, 755 F.2d 223, 234 (2d Cir. 1985).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 677 August Term, 1985

Decided January 29, 1986

Docket No. 85-6184

CARLENE MACK, Individually and on behalf of all other persons similarly situated; SHIRLEY STUKES; PATRICIA RAMSURE; QUEEN ESTHER TAYLOR; THELMA BARNES; MAXINE McNEILL; and TRINIA LEWIS, Intervenor,

Plaintiffs-Appellants,

v.

DONALD RUMSFELD, Individually and in his official capacity as Secretary of Defense; MARTIN R. HOFFMAN, Individually and in his official capacity as Secretary of the United States Army; THOMAS C. REED, Individually and in his official capacity as Secretary of the United States Air Force,

Defendants-Appellees.

B e f o r e: TIMBERS, MESKILL and PRATT, Circuit Judges.

ORDER AMENDING OPINION

It is hereby ORDERED:

1. Page 3, lines 12-16 (slip op. page 1252, lines 17-21):

Delete:

> We note that Crawford has been substantially limited by the subsequent Supreme Court opinion in Rostker v. Goldberg, 453 U.S. 57 (1981), and our interpretation of Rostker in Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985).

And substitute therefor:

> We note that the portion of Crawford that stated that judicial deference to military decisions applies only to the question of their justiciability and that military decisions are accorded no presumption of validity in an inquiry on the merits, see 531 F.2d at 1121, was specifically rejected by us as to matters "reasonably relevant and necessary to furtherance of our national defense" in Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985), in light of the

intervening Supreme Court opinion in Rostker v. Goldberg, 453 U.S. 57 (1981).

/s/ William H. Timbers, U.S.C.J.

/s/ Thomas J. Meskill, U.S.C.J.

/s/ George C. Pratt, U.S.C.J.

Supreme Court, U.S.
FILED
JUN 30 1986
JOSEPH F. SPANIOL JR.
CLERK

No. 85-1797

In the Supreme Court of the United States

OCTOBER TERM, 1985

CARLENE MACK, ET AL., PETITIONERS

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
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Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1797

CARLENE MACK, ET AL., PETITIONERS

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that military regulations prohibiting the enlistment of single parents who maintain custody of minor children are unconstitutional because the regulations violate fundamental family rights.

1. Since the mid-nineteenth century, the military has limited the peacetime enlistment of persons with dependents. The military regulations have varied in

content in recent years. In 1972, the Army and the Air Force amended their enlistment policies to permit enlistment of single parents with minor children, but both services experienced a decline in readiness and mobility as the result of those amendments. The Air Force (in 1974) and the Army (in 1975) therefore returned to their earlier practice and adopted regulations prohibiting the enlistment of single parents who maintain custody of minor children (Pet. App. A45-A48, A52-A55). In 1978, the Air Force again experimented with a policy permitting the enlistment of single parents on a case-by-case basis, yet it once again experienced readiness and deployment difficulties as a result. The Air Force in 1982 accordingly reinstituted its ban on single parent enlistment. The Army and Air Force regulations currently in effect prohibit the enlistment of single parents having custody of minor children (*id.* at A49-A51, A55-A56).

Petitioners are female single parents who were denied enlistment in the Army, Army Reserve, Air Force, or Air Force Reserve. In 1976, they brought this class action in the United States District Court for the Western District of New York challenging the constitutionality of military regulations prohibiting the enlistment of single parents having custody of children under 18 years of age. Petitioners challenged these regulations inter alia on the grounds that they constitute unlawful gender discrimination and interfere with fundamental family rights (Pet. App. A5). Following extensive discovery, the district court granted the government's motion for summary judgment (*id.* at A2-A44). The court accepted petitioners' contention that the military regulations are subject to judicial review, but it nonetheless held that

the ban on single parent enlistment meets constitutional standards. The court rejected petitioners' argument that the regulations interfere with their constitutional right to have a family, noting that the regulations "simply prohibit plaintiffs, as single parents, from enlisting in the Army or [the] Air Force" and that "[t]here is no constitutional right to join the military" (*id.* at A15). The court concluded that the enlistment restrictions are reasonable national defense measures and that the record supports the military's concerns about readiness of deployment and mobility (*id.* at A37). The court of appeals unanimously affirmed in a per curiam decision, "substantially for the reasons set forth in [the district court's] opinion" (*id.* at A60).

2. The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on the question presented. There is no conflict with any decision of this Court and no other reason warranting further review.

This Court has repeatedly recognized that " 'the military is, by necessity, a specialized society separate from civilian society.' " *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 3 (quoting *Parker* v. *Levy*, 417 U.S. 733, 743 (1974)). Accordingly, judicial review of military regulations "is far more deferential than constitutional review of similar laws or regulations designed for civilian society," and "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" (*Goldman*, slip op. 4). In this case, the Armed Services have determined, based on actual experiments designed to test the feasibility of single parent enlistment, that single parents generally are unable to

meet the stringent requirements of military readiness and deployment. The military's considered professional judgment on this matter is entitled to respect.[1]

The military's prohibition against single parent enlistment does not result in an unconstitutional burden on petitioners' right to raise a family, the sole burden of which petitioners now complain (see Pet. i). This Court has held that certain family-based decisions do enjoy constitutionally protected status. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (invalidating a state statute banning interracial marriage). When the government seriously intrudes on basic choices concerning the composition of the family unit, the Court has "examine[d] carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977). But such scrutiny has been applied only when the government regulation, at a minimum, "directly and substantially" interferes with family choices. *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986), slip op. 3; *Zablocki* v. *Redhail*, 434 U.S.

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[1] The record in this case amply supports the military's restrictions on single parent enlistment. The Army and the Air Force have shown, through documentary evidence and deposition testimony, that their enlistment limitations are necessary to maintain the military's mobility and readiness requirements. See Pet. App. A16-A22. Members of the Armed Services must be ready for immediate deployment in distant places, often at a moment's notice. Single parents with responsibility for children present unacceptable deployment problems. The military has not reached this conclusion through mere speculation. The military's actual experience during 1972 and 1978, when single parent enlistment was temporarily allowed, has verified the difficulties resulting from that policy as well as the impracticality of alternative solutions (*ibid.*).

374, 386-387 & n.12 (1978); *Califano* v. *Jobst*, 434 U.S. 47, 58 (1977). In this case, the military has not taken any action that in any way interferes with an individual's choices about having a family, not having a family, or raising a family as he or she sees fit. Petitioners remain free to have and raise children as single parents. The Armed Services have simply established the absence of "single parenthood" as one among the many enlistment qualifications that reflect the unique needs of the military. And even if these enlistment restrictions were thought to infringe some fundamental right, the military's interest in maintaining our national defenses would amply justify the restriction. The military can properly limit enlistment to persons who, in its judgment, can meet its necessarily stringent standards of readiness and mobility.[2]

Finally, petitioners argue somewhat confusingly (Pet. 28) that their family-rights claim "has received no review at all from any court." To the contrary, the district court found petitioners' family-rights claim justiciable (Pet. App. A5-A14)[3] and

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[2] Petitioners argue that a "constitutionally acceptable alternative to respondents' present regulations would be individualized screening of single parents through the enlistment process" (Pet. 23). However, this Court's precedents permit the military, like other governmental bodies, to develop policies and draw lines based on reasonable generalizations (*Goldman*, slip op. 6). In any event, the Air Force has already tried a case-by-case approach to single parent enlistment and has found that approach unsatisfactory. See page 2, *supra*. See, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 767-785 (1975).

[3] In so holding, the district court rejected the government's contention that petitioners' challenges were nonjusticiable (Pet. App. A7-A9), a position supported by precedent from other circuits. See *Lindenau* v. *Alexander*, 663 F.2d 68 (10th

rejected it on the merits (*id.* at A15). The court of appeals affirmed "substantially for the reasons set forth in [the district court's] opinion" (*id.* at A60). The relative brevity of the courts' analysis of petitioners' family-rights claim—one of three constitutional challenges that petitioners proffered below—undoubtedly reflects an evaluation of the claim's insubstantiality.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JUNE 1986

Cir. 1981); *West* v. *Brown*, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978). But see *Dillard* v. *Brown*, 652 F.2d 316 (3d Cir. 1981) (holding that a similar constitutional claim was justiciable).

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